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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TOBIAS WEISS, GERTRUDE O. WEISS,

Petitioners,

—v.—

EL AL ISRAEL AIRLINES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is a common-law tort claim, for physical abusive treatment by an airline of passengers at the airline terminal, preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), which prohibits a state or any of its subdivisions from enacting or enforcing any provision "related to a price, route, or service" of an air carrier.

More pointedly, does that statutory prohibition of state action regarding airline "service", prohibit the common-law tort claim.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Tobias Weiss and Gertrude O. Weiss, husband and wife, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The order of the United States Court of Appeals for the Second Circuit is reported at 2009 WL 367559 (C.A.2 (N.Y.)), and is reproduced in the Appendix annexed hereto.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Second Circuit was entered on February 13, 2009. This petition is being filed within ninety days of that order. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The tort claim involved in this case is set forth in the Second Count of the complaint. It is NOT based on the "bumping" or failure to provide the air transportation. The tort claim is based on abusive treatment by the airline at the terminal after it failed to provide any air transportation for plaintiffs during a period of two days even though they had tickets and reserved seats.

THE COMPLAINT

The plaintiffs bought two tickets, with confirmed reserved seats, for transportation by the defendant airline from New York City (Kennedy) to Jerusalem at a cost of $2,434. The scheduled departure was on March 31, 2004 at 6:30 P.M.

Plaintiffs arrived at defendant's terminal at Kennedy at 5:28 P.M. on March 31, 2004, and were cleared for boarding by the airline security. They were then told that their seats had been given to other persons, and they were denied boarding on the plane for which they had tickets.

The reason for the airline's exclusion of the plaintiffs from their ticketed flight is that the airline deliberately sold more tickets for that flight than it had seats on the plane, deliberately overbooking the flight, and then engaged in the practice of "bumping" passengers from the flight even though they had reserved seats on it.

The airline then induced the plaintiffs to remain for two days at the airline terminal. They were put on standby status by the airline, and were otherwise induced by the airline to remain there at its terminal until 11:30 in the evening on March 31 and April 1, 2004. The airline nevertheless refused to give any transportation to plaintiffs during those two days.

Plaintiffs then bought the needed transportation to Israel on British Airways.

The airline never informed plaintiffs that it engaged in overbooking and bumping when they bought their reserved seat tickets for that flight. No notice was included with the tickets that the flight would be overbooked and there would be bumping.

The airline failed to display at its terminal any notice of its overbooking practices, its procedure for loss of seating, or for compensation to the affected passengers, and failed to give required statements to plaintiffs.

Nor was any reimbursement made to plaintiffs for the cost of the tickets for which plaintiffs were refused transportation.

In the Second Count, a common law cause of action is alleged for physical and emotional suffering inflicted by the airline during the two days it induced plaintiffs to remain at its terminal. For two days, the airline had plaintiffs move around repeatedly in trying to deal with airline employees to give them transportation to Jerusalem. The attitude of the airline and its employees toward plaintiffs throughout those two days was indifferent, shunting plaintiffs and their baggage from place to place just to get rid of them. The result of those two days of abusive treatment and hardship, imposed by the airline on plaintiffs, was a failure of the airline to furnish any transportation to plaintiffs.

REASONS FOR GRANTING THIS PETITION AND REVIEW BY THE SUPREME COURT

This case and its questions of law should be reviewed and settled by the Supreme Court because there is a conflict in the rulings of the courts of appeals, and that conflict should be resolved. Further, there is involved the scope and meaning of a federal statute (§ 105 of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1)) which is important for airline transportation.

The Court of Appeals, in this case, in its opinion expressly recognized that it was in conflict with the position of the Court of Appeals for the Third Circuit and in conflict with the Court of Appeals for the Ninth Circuit, *citing Taj Mahal Travel, Inc.* v. *Delta Airlines Inc.*, 164 F.3d 186 (3d Cir. 1998) and *Charas* v. *Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. (1998).

We further respectfully rely on the following opinion of Justice O'Connor (at 531 U.S. 1058), joined by Chief Justice Rehnquist and Justice Thomas, in dissenting from the denial of certiorari in *Northwest Airlines, Inc.* v. *Duncan*, 208 F.3d 1112 (9th Cir. 2000):

> "JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.
>
> "The petition for a writ of certiorari in this case presents an important issue that has divided the Courts of Appeals: the meaning of the term "service" in the portion of the Airline Deregulation Act of 1978 (ADA) that pre-empts any state law "related a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). I would grant the petition to resolve this issue and bring needed certainty to this area of the law.
>
> "We have addressed the scope of the ADA's pre-emption provision on two prior occasions. In *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992), we noted the "broad pre-emptive purpose" of the ADA. And while we have never directly addressed the definition of "service" within the meaning of § 41713(b)(1), we have suggested that this term encompasses

"access to flights and class-of-service upgrades." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 226 (1995). The Courts of Appeals, however, have taken directly conflicting positions on this question of statutory interpretation.

"The Ninth Circuit below, adhering to its decision in *Charas* v. *TWA*, 160 F. 3d 1259 (1998) (en banc), held that the term "service" encompasses " 'the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,' " but not the " 'provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.' " 208 F. 3d 1112, 1114-1115 (2000) (quoting *Charas*, *supra*, at 1261). The Third Circuit has expressly agreed with this approach. *Taj Mahal Travel, Inc.* v. *Delta Airlines Inc.*, 164 F. 3d 186, 194 (1998). In contrast, three Courts of Appeals have adopted a much broader definition. See *Hodges* v. *Delta Airlines, Inc.*, 44 F. 3d 334, 336 (CA5 1995) (en banc) (defining "service" in terms of the " '[contractual] features of air transportation,' " including " 'ticketing, boarding procedures, provision of food and drink, and baggage handling' "); *Smith* v. *Comair, Inc.*, 134 F. 3d 254, 259 (CA4 1998) ("Undoubtedly, boarding procedures are a service rendered by an airline") (citing *Hodges*, *supra*, at 336); *Travel All Over The World, Inc.* v. *Kingdom of Saudi Arabia*, 73 F. 3d 1423, 1433 (CA7 1996) (adopting *Hodges* definition). See also *Chukwu* v. *Board of Directors British Airways*, 889 F. Supp. 12, 13 (Mass. 1995), aff'd mem., 101 F. 3d 106 (CA1 1996) (same).

"Given these opposing interpretations, I believe we should hear this case. The legal issue is an important one, well suited for resolution by this Court. The two leading cases, *Charas* and *Hodges*, are both the product of en banc consideration. They have fully explored the relevant considerations, including the language and history of the ADA and its pre-emption clause, as well as the policies supporting the possible interpretations of the term "service." Compare *Charas*, *supra*, at 1262-1266, with *Hodges*, *supra*, at 336-339.

"Resolution of this question would provide needed certainty to airline companies. While this case involves the potential pre-emption of a state law personal-injury claim based on an airline's smoking policy, the legal principle at stake has ramifications for a host of other tort actions against airlines. See, *e.g.*, *Smith*, *supra* (false imprisonment and intentional infliction of emotional distress); *Travel All* Over *The World*, *supra* (defamation). Because airline companies operate across state lines, the divergent pre-emption rules formulated by the Courts of Appeals currently operate to expose the airlines to inconsistent state regulations. Cf. *Morales*, *supra*, at 378 (the ADA's pre-emption provision is intended "[t]o ensure that the States would not undo federal deregulation with regulation of their own").

"A decision from this Court would provide needed clarification on this discrete and important issue of statutory interpretation. Accordingly, I respectfully dissent from the denial of the petition for certiorari."

CONCLUSION

For the foregoing reasons, review by the Supreme Court is respectfully requested.

Respectfully submitted,

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